No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SUPREME COURT, U.S.
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TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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The United States does not deny in its Motion to Affirm that the question presented in appellants' Jurisdictional Statement is substantial nor does it urge that this Court summarily affirm the judgment below. This reticence by the United States contrasts with its practice in other cases. *See, e.g.*, Motion to Affirm in Part and Vacate in Part, *Wetherell v. De Grandy*, No. 92-519, at 8, 23 (finding of liability "should be summarily affirmed"); Motion to Affirm in *North Dakota v. United States*, No. 88-926, at 11 ("[p]lenary review is . . . unwarranted and the decision should be summarily affirmed"); Motion to Affirm in *Sable Communications of California, Inc. v. FCC*, No. 88-515, at 13 (same); Motion to Affirm in *City of Pleasant Grove v. United States*, No. 85-1244, at 6 (same). Thus, on the matter immediately before this Court—whether the question presented

is substantial and warrants plenary review—the United States has expressed no disagreement with appellants that plenary review is appropriate.[1]

Plenary review is warranted in any event. Although appellees seek affirmance on the basis of supposedly established doctrines, the doctrines that they actually advance are anything but established. Appellees urge this Court to hold, among other things, that Congress can use targeted legislation to dictate whose speech will be carried by the press; that cable operators and programmers may be given the lesser First Amendment protection given to holders of broadcast licenses, despite the fact that providers of cable television are not limited by conditions of spectrum scarcity; and that legislation directly and deliberately altering the content of speech uttered by private speakers is something other than "content-related." For the Court to adopt any of these theories would afford government hitherto unknown power to interfere in the private marketplace for speech and reshape that marketplace more to its own liking. Grounded in neither precedent nor principle, these arguments provide no basis for affirmance at all, much less for summary action.

1. a. The United States, as its principal argument, takes the position that Congress, with only modest judicial review, can broadly regulate the press to correct what it sees as "market failure" in the forum for speech and

[1] Appellees Association of America's Public Television Stations, *et al.*, oppose plenary review based upon their assertion that, at some point in the future, some cable systems may have enough channels to accommodate all potential programmers. Motion at 14-18. That speculation, even if relevant to the constitutional analysis, has little to do with the judgment currently before the Court, which upholds the right of Congress to mandate carriage of local broadcast stations under current conditions and regardless of the channel capacity of any particular system. And, unlike the circumstances presented in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), the Court has before it a sufficient record on which to decide the question presented.

to "ensur[e] that a diversity of programming and information will be available." Motion at 10. It is well-established, of course, that legislatures have broad power to regulate businesses generally and that economic regulation is typically subjected to minimal judicial scrutiny. But it is likewise the case that legislative efforts to regulate the press have traditionally been viewed with great suspicion under the First Amendment. This Court has reasonably accommodated both of these principles by holding, on the one hand, that it will engage in deferential review when "generally applicable economic regulations" are applied to the press but, on the other hand, that it will undertake strict scrutiny when legislatures "single out" the press for targeted, industry-specific legislation. *Compare Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) *with Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991). In saying that "the proper framework for evaluating the First Amendment issues in this case is found in *Associated Press v. United States*, 326 U.S. 1 (1945)"—a case involving application of the general antitrust laws to members of the press—the United States has set off on the wrong track. Motion at 10.

The distinction between general and specific laws in this connection has not been drawn out of thin air: it reflects the very different degrees to which the two types of laws threaten freedom of speech and of the press. Because a truly general law applies broadly to entities other than the press, the law will typically prove too unwieldy a mechanism for compelling, prohibiting, or otherwise interfering with the content of speech. *See Minneapolis Star*, 460 U.S. at 585.[2] Moreover, even with respect to

[2] This Court has frequently rejected efforts to characterize laws singling out the press as nothing more than general economic regulation. *See, e.g., Minneapolis Star*, 460 U.S. at 581; *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Riley v. National Fed'n of the*

general prohibitory laws—which, like the antitrust laws, are subject to case-by-case enforcement—the necessary application of the statute to other businesses provides a benchmark by which to identify, and assess, any arbitrary application to the press. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761 (1988) ("the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the [officials'] occasional speech-related decision"); *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2464 (1991) (Scalia, J., concurring in judgment). These safeguards are entirely absent when the legislative branch marks out the press for special regulation in ways that directly or indirectly control what the press may say, and strict judicial scrutiny of such laws is required.

b. Although this Court has upheld broad regulation of the broadcasting industry, the United States admits that potential operators of cable systems do not confront the sort of physical scarcity faced by potential users of the electromagnetic spectrum. To tie cable television and broadcasting together, therefore, the United States makes the bold declaration that the "critical factor" justifying the broad regulation of broadcast television "has not been the physical phenomenon of spectrum scarcity as such, but the resulting inability of the broadcasting market to function successfully." Motion at 21. But this revisionist history is flatly contrary to statements by this Court to the effect that "spectrum scarcity" is "[t]he prevailing rationale for broadcast regulation." *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984); *see also Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3010 (1990)

Blind of North Carolina, Inc., 487 U.S. 781, 789 n.5 (1988). In *Riley*, the Court declined to treat a law regulating the fees of professional fundraisers as "merely economic," observing that "[f]ar from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech." *Id.*

(restraints permitted "[b]ecause of the scarcity of [electromagnetic] frequencies"). Furthermore, if the asserted existence of a misfunctioning market alone were enough to justify broad restraints on speech, then the statute at issue in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)—which, like the must-carry law, was justified as an effort to expand diversity of speech in the face of local monopolies—would seem to have been an entirely proper exercise of government power. This Court made clear in *Tornillo*, however, that a lack of competition among members of the press, unlike physical scarcity, does not justify making government the arbiter of what may and may not be said. *See also Turner Broadcasting Sys., Inc. v. FCC*, 113 S. Ct. 1806, 1807-08 (1993) (Rehnquist, C.J., in chambers) ("Under *Tornillo*, Congress plainly could not impose the must-carry provisions on privately owned newspapers.").

Taking a related tack, the United States argues that the federal government, having aided the growth of cable television, may now assume exceptional powers to determine the types of programming it delivers. The sole citation offered to support this proposition, however, is the decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which turns on the unique circumstances of broadcast licensees. If the United States means to suggest that cable operators have received from the federal government (or even local governments) a benefit comparable to the right to use the scarce electromagnetic spectrum, the suggestion is totally off the mark: the record in this matter stands uncontroverted that there are no physical limitations on the ability to construct cable systems equivalent to the physical scarcity of the broadcast spectrum. *See* Time Warner Statement of Material Facts ¶ 23; Collins 2/11/93 Aff. ¶ 21; Defs.' Response to Time Warner Statement of Material Facts ¶ 23. If the United States instead means to argue that organs of the press accepting government benefits thereby surrender the right to control the content of their speech, the argument is

without any coherent foundation. There is no general principle that the receipt of a government benefit, *e.g.*, lower postal rates or exemptions from sales taxes (as in *Leathers v. Medlock*, 111 S. Ct. 1438 (1991)), fundamentally alters the relationship between the government and the press, permitting the government to engage in otherwise impermissible regulation. To whatever extent government may have assisted in the growth of cable television, it remains a *private* medium of communication and, absent a showing of compelling need, properly free to choose the programming for its viewers without government interference.

2. This Court has also required strict scrutiny of laws that are "content-based." *See Riley*, 487 U.S. at 795. Although the United States concedes that "the must-carry provisions . . . alter the content of programming," it nevertheless manages to claim that they are "not content-related for First Amendment purposes." Motion at 23. Relying on *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the United States argues that the Court must first look to the purpose of the regulation: "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Motion at 23. Appellee NAB makes a similar point, contending that under *Ward* the proper inquiry is whether the law is "*justified* without reference to the content of the regulated speech." Motion at 9 (citation omitted).

These arguments are based on obvious misreadings of this Court's decisions. The reason why this Court at times has initially inquired into the purpose of, or justification for, statutes is to determine whether laws aimed at conduct (*e.g.*, the burning of a draft card [3] or sleeping in a public park [4]) or laws purporting to regulate the time, place, and manner of speech (*e.g.*, the noise level at rock

[3] *See United States v. O'Brien*, 391 U.S. 367 (1968).

[4] *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

concerts [5]) are entitled for those reasons to more lenient scrutiny or whether—because, though seemingly neutral on their face, they are actually intended to control the content of speech—they must be reviewed according to the traditional, more exacting standard. Put another way, the test serves to identify laws that, while not overtly interfering with the content of speech, are nonetheless enacted for that purpose. But where, as here, a law on its face directly and explicitly alters the content of speech, the nature of the regulation itself is enough to establish that strict scrutiny is necessary, regardless of the non-speech justifications the government may advance. In *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1507 (1993), for example, the Court agreed that regulation of newsracks by the city was " 'justified' by its interest in safety and esthetics," but nevertheless imposed strict scrutiny because the law enacted an explicit preference for certain kinds of publications at the expense of others.[6]

Because the must-carry law necessarily alters the content of speech carried by cable operators, appellees seek to convince the Court that a preference for certain speakers should be treated differently from a preference for certain speech. But this argument fails on several counts. As a legal matter, it is doubtful that a government, without compelling reasons, could require members of the press to devote part of their limited capacity to the speech of organizations selected by the government, even if the government somehow could demonstrate that it was oblivious or indifferent to what the speakers might say. At the

[5] *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[6] The decision in *Riley* points to the same conclusion. There, in assessing a law requiring professional fundraisers to disclose the percentage of collected funds actually remitted to charity, the Court looked to the nature of the regulation (mandated speech) and stated: "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." 487 U.S. at 795; *see id.* at 798 ("North Carolina's content-based regulation is subject to exacting First Amendment scrutiny").

very least, that sort of directive would put government squarely in the middle of what would otherwise be private choices about selection of speech, a role typically barred to government under the First Amendment. *See Tornillo*, 418 U.S. at 258. Furthermore, as a practical matter, it is always highly unlikely that a governmental preference for one speaker over another will have nothing to do with the content of their speech. That is especially so here: Congress is favoring only those speakers subject to federal oversight by virtue of their receipt of broadcast licenses, an oversight that justifies a unique level of federal involvement with programming. And Congress gave explicit approval to the general nature of broadcast speech in explaining its mandatory preferences. *See* J.S. 20-21.[7]

3. The United States flatly asserts that the must-carry law is neither an impermissible interference with the editorial discretion of cable operators nor an improper discrimination against cable programmers. It argues only the first point, however, and its arguments are basically unsound.

The gist of these arguments is that the editorial discretion of cable operators is of a lesser order than the editorial discretion of other members of the press, more akin to the decision-making of the shopping-center owner in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), than the newspaper editors in *Tornillo*. In fact, however, as this Court has already recognized, cable operators do precisely what members of the press traditionally do: they create and select a package of "news, information, and entertainment" for sale to the public. *See Leathers v. Medlock*, 111 S. Ct. at 1442. Furthermore, in drawing analogies to shopping centers and newsstands, the United States seems to be missing the basic fact that

[7] Appellee NAB states that appellants "do[] not argue that Section 4 fails scrutiny under the *O'Brien/Ward* test." Motion at 12. In fact, appellants have contended and continue to contend that this statute fails scrutiny "even under the less demanding *O'Brien* test." J.S. 24.

the must-carry law, by its very terms, will diminish the amount of speech that cable operators may choose for their subscribers. For every channel that cable operators are forced by law to favor, they must disfavor the speech of a different programmer that they would prefer to carry. The must-carry law thus is very different from a law requiring shopping centers to permit pamphleting or a law controlling the placement of papers in newsracks or on newsstands: in neither of those cases does the law directly threaten the right of those engaged in speech to choose what they wish to say to the public. Here, however, the programming selected by Congress will routinely displace other programming selected by the cable operator.

The failure of the United States to come to grips with this basic fact may explain why it largely ignores the cable programmers' claims. Appellee NAB attempts to fill that breach, arguing that "[s]o long as Congress does not 'aim at the suppression of dangerous ideas,' it is free to treat different classes of speakers differently, even though that may have the effect of enhancing the speech of some classes over the speech of others." Motion at 22. But this argument was flatly rejected by this Court in each of the last two Terms. *Simon & Schuster*, 112 S. Ct. at 509; *City of Cincinnati*, 113 S. Ct. at 1516. As the Court stated in *City of Cincinnati*, "we [have] expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" 113 S. Ct. at 1516 (quoting *Simon & Schuster*, 112 S. Ct. at 509).

This is as it should be. Discrimination among speakers runs afoul of a core premise of the First Amendment: that it is not generally the business of government to decide who shall and who shall not be allowed to speak. *See Leathers v. Medlock*, 111 S. Ct. at 1444. Although there are instances when government *must* discriminate among speakers, those instances are properly confined to situations in which government is selecting among competing applicants in its administration of government property or its appropriation of government funds. Here, the

circumstances are very different: Congress is not making an unavoidable choice in its role as overseer of public funds or property; it is reaching out to alter the choices made by *private* entities in the *private* marketplace for speech. That kind of discrimination is what this Court has rightly condemned as intolerable under the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

4. Although the United States argues that this Court must accept the facts found by Congress in deciding whether the must-carry law is consistent with the First Amendment, we believe that the Court had it right in *Sable Communications* when it stated that the Court must exercise "independent judgment of the facts bearing on an issue of constitutional law." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989). In any event, even the facts as found by Congress do not justify the must-carry law. The facts reveal that, in the absence of a must-carry obligation, the overwhelming majority (95%) of broadcast stations are being carried voluntarily by cable systems, and it is undisputed that broadcast stations are growing in number. Moreover, were there any real uncertainty about the continued availability of broadcast television to a wide audience, it is inconceivable that Congress would, as it did, suddenly provide stations with the right—embodied in the "retransmission consent" provision—to *refuse* carriage on cable systems. Given the tradition of disfavoring prophylactic regulation that limits First Amendment rights, Congress simply cannot justify so sweeping a law on the basis of conjecture that what has demonstrably *not* happened in the past (widespread refusal to carry broadcast stations) might, perhaps, happen someday in the future. *See Century Communications Corp. v. FCC*, 835 F.2d 292, 303 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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